

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-1136

To be argued by
PHYLIS SKLOOT BAMBERGER *B*

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

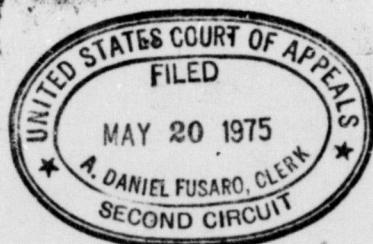
THOMAS MURPHY and
ROBERT WIDMAN,

Appellants.

Docket No. 75-1136

APPENDIX TO THE BRIEF
FOR APPELLANT WIDMAN

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
ROBERT WIDMAN
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel

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PAGINATION AS IN ORIGINAL COPY

74CR 817

74CR4
MISHLER,

TITLE OF CASE

ATTORNEYS

THE UNITED STATES

For U. S.: O'BRIEN

VS.

WIDMAN-Jerald Rosentha

THOMAS B. MURPHY and

250 W. 57th Street N.Y.,

ROBERT WIDMAN

For Defendant: Murphy:

Harold Borg

123-60 83rd Ave

Kew Gardens, N.Y.

BU 1-1200

Bank Robbery

ABSTRACT OF COSTS

AMOUNT

CASH RECEIVED AND DISBURSED

DATE

NAME

RECEIVED

DISBURSED

Fine,

4/4/75

Notice of Appeal (no fee)

Clerk,

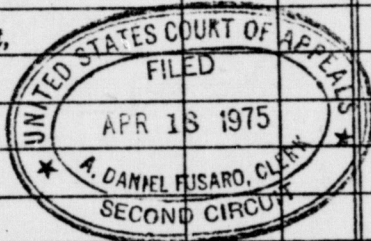
(BOTH DEFTS)

Marshal,

Attorney,

Commissioner's Court,

Witnesses,



DATE

PROCEEDINGS

- 12/26/74 Before MISHLER, CH.J.- Indictment filed
- 1-8-75 Notice of Appearance filed as to deft Murphy.
- 1-8-75 Before MISHLER, CH J - case called - deft Murphy & counsel Harold Borg present - deft Widman present without counsel - court to appoint counsel for deft Widman. Deft Murphy arraigned and enters a plea of not guilty - court enters a plea of not guilty as to deft Widman - bail set at \$25,000 as to deft Murphy and \$100,000 as to deft Widman - Identification hearing set down for Jan. 24, 1975 at 1:00 PM. Trial set down for Jan. 27, 1975 at 10:00 A.M.
- 1/13/75 Notice of readiness for trial filed
- 1-27-75 Before MISHLER, CH J - case called - defts Murphy & Widman present with counsels - hearing held on motion to suppress - hearing contd to Jan. 27, 1975 at 9:30 am

74CR 817

DATE	PROCEEDINGS
1-27-75	Before MISHLER, CH J - case called - defts Murphy & Widman & counsels present - hearing contd - trial order and BEGUN - Jurors selected and sworn - Hearing held on voluntariness of statements - motion to suppress denied - hearing concluded - Trial contd to Jan. 28, 1975.
1-28-75	Before MISHLER, CH J - case called - defts present with attys - Trial resumed - Trial contd to Jan. 29, 1975 at 10:00 am.
1-29-75	Before MISHLER, CH J - case called - defts Murphy & Widman present with counsels - trial resumed - trial contd to 1-30-75., at 11:15 am.
1-30-75	Before MISHLER, CH J - case called - defts present with attys - trial resumed - Govt rests - motion by the defts for a judgment of acquittal is denied - Deft WIDMAN rests - trial contd to 1-31-75.
1-31-75	Before MISHLER, CH J - case called - defts present with counsels - Trial resumed - deft Murphy rests - Motion renewed by the defts for Judgment of Acquittal is denied - At 4:25 PM Jury returned with a verdict of guilty on counts 2 & 3 as to both defts .Jury did not have time to arrive at a verdict on count 1 - Jury polled & discharged Trial concluded - Bail conditions modified as to deft Widman to \$50,000 surety bond signed by mother and father and a cash deposit of \$5,000. Bail conditions contd as to deft Murphy - all motions reserved until time of sentence - sentences adjd without date.
131-75	By MISHLER, CH J - Order of sustenance filed (Lunch)
2-18-75	7 stenographers transcript filed dated ^{one} Jan. 24, 1975; two dated Jan. 28, one dated Jan. 29, one dated Jan. 30 and one dated Jan. 31, 1975.
2-25-75	Voucher for Expert Services filed (Widman)
4/4/75	Before MISHLER, CH.J.- Case called- Defts and counsel present- Defts WIDMAN and MURPHY sentenced to imprisonment on count 2 for a period of 15 years pursuant to T-18, U.S.C. Sec. 4208(a)(2) and 5 years on count pursuant to T-18, U.S.C. Sec. 4208(a)(2)- said terms to run concurrently Court advised defts of their ght to appeal- Clerk to file notice of appeal without fee as to both defts- Bail as to deft Murphy set at \$50,000.00 surety bond
4/4/75	Judgments and Commitments filed- certified copies to Marshal (BOTH DEFTS)
4/4/75	Notice of appeal filed (without fee) (BOTH DEFTS)
4/4/75	Docket entries and duplicate of notice of appeal mailed to court of appeal
4/7/75	Certified copies of judgments and commitments ret'd and filed- defts delivered to Federal Detention Headquarters
4-14-75	Stenographers transcript filed dated 4-4-75 (Murphy)

74 CR==817

CRIMINAL DOCKET

[illegible]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SUPERSEDING
INDICTMENT

UNITED STATES OF AMERICA

- against -

THOMAS B. MURPHY and
ROBERT WIDMAN,

Defendants.

Cr. No. _____
(T. 18, U.S.C., §2113(a),
§2113(d), §2 and §371)

74CR 817

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 9th day of May, 1974, within the Eastern District of New York, the defendants THOMAS B. MURPHY and ROBERT WIDMAN knowingly and wilfully, by force, violence, and intimidation, did take from the person and presence of employees of the Chase Manhattan Bank, 190-02 Jamaica Avenue, Jamaica, New York, approximately Seventy Three Thousand Five Hundred Ninety Four Dollars (\$73,594.00), in United States currency, which money was in the care, custody, control, management and possession of the said bank, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation. (Title 18, United States Code, Sections 2113(a) and 2.)

COUNT TWO

On or about the 9th day of May, 1974, within the Eastern District of New York, the defendants THOMAS B. MURPHY and ROBERT WIDMAN knowingly and wilfully, by force, violence and intimidation, did take from the person and presence of employees of the Chase Manhattan Bank, 190-02 Jamaica Avenue, Jamaica, New York, approximately Seventy Three Thousand Five Hundred Ninety Four Dollars (\$73,594.00), in United States currency, which money was in the care, custody, control, management and possession of the said bank, the deposits of

Charge of the
which bank were then and there insured by the Federal Deposit Insurance Corporation, and in commission of this act and offense the defendants THOMAS B. MURPHY and ROBERT WIDMAN did assault and place in jeopardy the lives of the said bank employees, as well as the lives of other persons present by the use of a dangerous weapon. (Title 18, United States Code, Sections 2113(d) and 2.)

COUNT THREE

B
On or about and between the 6th day of May 1974 and the 9th day of May 1974, both dates being approximate and inclusive, within the Eastern District of New York, the defendants THOMAS B. MURPHY and ROBERT WIDMAN did knowingly and wilfully conspire to commit an offense against the United States, in violation of Title 18, United States Code, Section 2113(a) and Section 2113(d) by conspiring to take by force and violence a sum of money which was in the care, custody, control, management and possession of the Chase Manhattan Bank, 190-02 Jamaica Avenue, Jamaica, New York, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation.

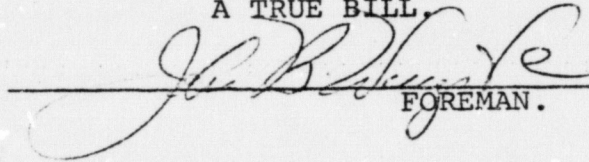
In furtherance of the said unlawful conspiracy and for the purpose of effecting the objectives thereof, the defendants THOMAS B. MURPHY and ROBERT WIDMAN, within the Eastern District of New York, committed the following

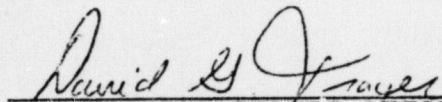
O V E R T A C T S

(1) On or about May 6th, 7th and 8th, 1974, the defendants THOMAS B. MURPHY and ROBERT WIDMAN positioned themselves within the vicinity of said bank at a place where the daily functions of the bank could be observed.

(2) On or about the 9th day of May 1974, the defendants THOMAS B. MURPHY and ROBERT WIDMAN entered the Chase Manhattan Bank at 190-02 Jamaica Avenue, Jamaica, New York, and had in their possession dangerous weapons.

A TRUE BILL.


FOREMAN.


UNITED STATES ATTORNEY

1
2 THE COURT: (Addressing the jury.)

3 What is proof, what is a reasonable doubt/
4 A reasonable doubt is a doubt which a reasonable
5 person has after carefully weighing all of the
6 evidence in the case.

7 Now, we understand that it is normal for
8 individuals to be disinclined to return a verdict of
9 of guilty, even where guilt is proven, so the kind of
10 a doubt that might arise from the disinclination to
11 find a defendant guilty who has been proven guilty
12 is not the kind of doubt we are talking about. We
13 are not talking about a vague or speculative doubt
14 or one based on emotion.

15 The kind of doubt we are talking about is one
16 that is present in the record, in the evidence in the
17 case.

18 Proof beyond a reasonable doubt -- I am sorry,
19 I would rather continue defining a reasonable doubt.
20 A reasonable doubt is the kind of doubt you might
21 have after dealing with all the evidence and would
22 hesitate to act upon if it concerned a matter of
23 importance to you.

24 Proof beyond a reasonable doubt is therefore
25 proof of such a convincing nature that you would be

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2 willing to rely and act upon unhesitatingly in the
3 most important of your own affairs.

4 The Government's burden is not to prove that
5 all the evidence or every bit of evidence that was
6 offered before you is true beyond a reasonable doubt,
7 the Government's burden, as heavy as it is, is not
8 to prove the guilt of the defendant beyond all doubt,
9 the Government's burden is to prove the guilt of the
10 defendant beyond a reasonable doubt.

11 When we talk about proof beyond a reasonable
12 doubt, I will charge you on the elements of each
13 crime charged and that the Government must prove all
14 the essential elements of the crime charged beyond
15 a reasonable doubt.

16 A reasonable doubt may arise from the failure
17 of the Government to produce evidence. The defendants
18 do not have to prove their innocence, the defendants
19 do not have to offer any proof whatsoever; on the
20 contrary, they are presumed to be innocent and they
21 may rely on the failure of the Government to prove
22 their guilt beyond a reasonable doubt.

23 Now in this case the defendant Widman has
24 offered as evidence, good general reputation for
25 honesty and as a law abiding citizen. The jury

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2 should consider that evidence along with all the other
3 evidence in the case.

4 Evidence that a defendant's reputation for
5 honesty or as a law abiding citizen have not been
6 discussed or that those traits of the defendant's
7 character have not been questioned may be
8 sufficient to warrant an inference of good reputation
9 as to those traits or character, and evidence of a
10 defendant's reputation consistent with those traits
11 of character which are ordinarily involved in the
12 commission of a crime charged may give rise to a
13 reasonable doubt since the jury may think it
14 improbable that a person possessing those traits of
15 character would commit the crime charged.

16 Now what is evidence:

17 Evidence is the method the law uses to prove
18 or disprove a disputed fact. Evidence is generally
19 classified as direct evidence or indirect evidence,
20 and indirect evidence is usually called circumstantial
21 evidence.

22 Direct evidence is the testimony of witnesses,
23 of what a witness saw or the witness said. Circum-
24 stantial evidence, on the other hand, is the method that
25 the jury uses for determining a disputed fact

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2 from an established fact.

3 Drawing a fair and reasonable inference based on
4 good common sense and experience:

5 In your search for the truth, you will find the
6 most valuable tools to be your own good common sense
7 experience. We have all lived sometime on this
8 earth and we have learned something from just living
9 here through our common experience. Do not be reluc-
10 tant to use your good common sense and experience and
11 say to yourselves, "Well, does this make sense?" It
12 is a good question which you might ask repeatedly
13 throughout your deliberations.

14 I would like to use an example of the difference
15 between direct and circumstantial evidence, it will
16 be helpful in explaining the definition I just gave
17 you.

18 Let us assume that my courtroom deputy, Mr.
19 Adler, and myself were standing on the street corner
20 one day and at that street corner there was a stop
21 sign, he with his back to the roadway and the stop-
22 sign and I having the entire sign and roadway in
23 plain view.

24 Let us assume that while speaking with him I
25 noticed a motor vehicle that I later identified as a

1975 white Cadillac speeding along at 65 miles an hour, pass the stop sign without stopping and strike a woman.

If I were called to testify in a personal injury action where the woman was suing the driver of the car, I would be able to testify to the fact that that motor vehicle passed a stop sign without stopping.

If you were sitting here as a jury in this case, plaintiff claiming that the defendant passed a stop sign without stopping and the defendant claiming that he stopped at the stop sign and proceeded, you would recognize that the disputed fact was whether or not the defendant passed a stop sign without stopping.

If I were called to testify, it is clear that I could give direct testimony on that fact at issue.

Now Mr. Adler did not have the stop sign in view but he nevertheless could testify concerning the circumstances from which you might reasonably draw the inference that that motor vehicle passed the stop sign without stopping.

He might say that he was talking with me and as he glanced to his right the 1975 Cadillac came

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2 within his view, within his peripheral vision, and
3 he noticed the car proceeding at about 65 miles an
4 hour, that he lost sight of the car and that it was
5 about 150 feet and two or three seconds later when
6 he looked to the left and saw the same motor vehicle
7 at the same rate of speed and it knocked down the
8 plaintiff.

9 Again the disputed issue of fact is whether that
10 vehicle passed the stop sign without stopping. From
11 the circumstances I think you will agree with me
12 that it would be reasonable for you to infer that
13 that motor vehicle passed the stop sign without
14 stopping, that it was travelling 65 miles an hour
15 and that 150 feet later or two or three seconds later
16 it was travelling about the same speed so it couldn't
17 have stopped and then proceeded. At least that is
18 the fair and reasonable inference.

19 That is the difference between direct evidence
20 and circumstantial evidence.

21 The law does not hold that one type of evidence
22 is of better quality than the other. At times
23 direct evidence is of a better quality and at times
24 of
circumstantial evidence is/a better quality.

25 The law requires the Government to prove the

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guilt of the defendant beyond a reasonable doubt on
both the direct and the circumstantial evidence.

(Contd on next page.)

1 THE COURT: (Continuing) I used the term
2 "inference" and I used the term "presumption."

3 An inference is a conclusion which reason and
4 common sense leads the jury to draw from facts which
5 have been established by the evidence in the case.
6 An example of that, of course, is the inference which
7 a jury draws in determining facts through circumstantial
8 evidence. A presumption, on the other hand, is a
9 conclusion which the law requires the jury to make,
10 and it continues only as long as it is not overcome
11 or outweighed by evidence in the case to the contrary
12 by proof beyond a reasonable doubt. The example of
13 that, of course, is the presumption of innocence.

14 What is evidence in the case? It is the sworn
15 testimony of the witnesses regardless of who may have
16 called them; it is the exhibits that were actually
17 received in evidence regardless of who produced them;
18 facts which may have been judicially noticed by the
19 Court -- I am not sure that I judicially noticed any
20 facts, but if I said, for example, that May 9, 1974,
21 was the Thursday of the week or that May 13, 1974,
22 was the Monday of the week, then I judicially noticed
23 the fact and it becomes a part of the record.

24 I think it is helpful to understand what is
25 not a part of the record and what you may not consider

Charge of the Court

in arriving at your determination:

First, statements or arguments made by counsel in both the openings and the summations. Counsel pointed out to you the purpose; both are very helpful tools or guides for the jury, but they are not evidence. The openings were designed to alert you to the positions of the parties. The summations or arguments made by the lawyers focused on what they believed the crucial issue in the case was: they pointed out the evidence relating to whether the accused were at the bank and in the bank on the morning of May 9, 1974. Of course, the defendants argued theories of exculpability, which in effect say the Government failed to prove the guilt of my client by proof beyond a reasonable doubt. The argument of the Government was, in effect, that the Government has proved the guilt of both defendants by proof beyond a reasonable doubt.

The arguments again are intended to guide you as to what the lawyers think is the important evidence and what are the important issues and to help you arrive at a fair determination.

They are not intended

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2 to be evidence. And if the lawyers have misquoted
3 or misinterpreted the evidence, then you use your
4 own recollection as to what the evidence was. And
5 of course we have a transcript of the testimony and
6 I will tell you later that if there is a question in
7 your mind as to what anyone said, it will be read
8 back to you.

9 I don't recall making any remarks or statements
10 but if I did of course that is not evidence. I have
11 no standing in this trial except as the judge of the
12 law, and if I did make any statements, just disregard
13 them. If I asked a question, and I recall asking
14 just one or two, don't attach any special significance
15 to the question because I asked it. If I asked the
16 question it was only because I thought an area of
17 inquiry was a little confusing, confusing to me, it
18 may not have been confusing to you, but I assumed it
19 was, so I asked a question or two in the hope that it
20 might clarify the issue.

21 When that is stricken from the record, you
22 cannot consider that matter. As it is physically
23 stricken from the reporter's notes, so it should be
24 figuratively stricken from your minds and your memory.

25 At times, objection was taken to questions and

1 objections were sustained. You may not speculate
2 on what the answer may have been had the witness
3 been allowed to answer. On the same theory, if the
4 witness did not answer, then the evidence did not
5 get into the record, so you cannot speculate on what
6 he might have said if I had overruled the objection
7 and there had been an answer to the question.
8

9 You, the jurors, are the sole judges of the
10 credibility of the witnesses, which means the believ-
11 ability of their testimony and the weight their
12 testimony deserves.

13 Scrutinize the testimony given and the cir-
14 cumstances under which each witness testified and
15 every matter in evidence which tends to show whether
16 a witness is worthy of belief.

17 Now worthy of belief doesn't mean alone whether
18 you believe the witness was trying to tell the truth
19 or trying to avoid the truth or lie. It was pointed
20 out by counsel that he felt the bank employees who
21 testified did so in good faith, and I assume what he
22 meant is that they were attempting to tell the truth.

23 It doesn't always mean that you are to only de-
24 cide whether the witness is telling the truth or
25 attempting to lie because one of the problems that

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2 we will come to later is the witness' own ability
3 to observe or to have observed the perpetrators of
4 the crime, so there are other factors, of course,
5 which you take into consideration. When you use
6 your good common sense you will think of others, but
7 I suggest that you can consider the intelligence of
8 the witness, take into the consideration the motive
9 and state of mind of the witness, why is the witness
10 testifying, does the witness have a reason which might
11 indicate a reason to lie or to tell the truth.

12 The state of mind of the witness: take into
13 consideration the demeanor of the witness on the
14 witness stand and the manner in which the witness
15 answers the questions: Did the witness answer the
16 questions fully, did the witness tell everything
17 that he knew in answer to that question, was the
18 witness able to tell or to answer the question from
19 what that witness saw and observed.

20 Take into consideration the relationship that
21 each witness might bear to either side of the case.
22 You must consider that Mr. Carbone is a Special Agent
23 of the FBI and that he might have an interest in
24 seeing a successful prosecution. On the other hand,
25 the relationship of the mother and brother of the

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2 defendant is quite obvious, so take that into
3 consideration.

4 Take into consideration the manner in which
5 a witness might be affected by the verdict, take
6 into consideration the extent to which if at all the
7 witness is corroborated or contradicted by other evidence
8 in the case.

9 The Government offered testimony through Mr.
10 Carbone that the defendant Robert Widman at the time
11 or soon after his arrest made certain statements.
12 As I recall them -- and incidentally when I say as I
13 recall the testimony, don't take it for the Gospel
14 truth, you use your own recollection -- this, as I
15 recall it -- and I don't claim that my memory is any
16 better than yours, if I took a statistical guess I
17 would say that at least half of the jurors had a
18 better memory than I have --
19

20 (Continued next page.)
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2 But the testimony of Mr. Carbone is that
3 Mr. Widman said something to the effect that he
4 didn't know Mr. Murphy; and that he said this after
5 he had been shown a picture of Mr. Murphy; he said
6 that he had never been in a 1965 blue Cadillac; he
7 said that he had never used the alias of Robert
8 Hoffman; and he said he hadn't ever been to Honolulu,
9 as I recall it, within the last year.

10 The conduct of the defendant, including state-
11 ments, knowingly made upon being informed that a
12 crime had been committed or upon being confronted with
13 a criminal charge, may be considered by the jury in
14 the light of all the other evidence in the case in
15 determining guilt or innocence. When a defendant
16 voluntarily and intentionally offers an explanation
17 or makes some statement tending to show his innocence,
18 and this explanation or statement is later shown to
19 be false, the jury may consider whether this cir-
20 cumstantial evidence points to a consciousness of
21 guilt.

22 In other words, whether you may draw an infer-
23 ence from the false statements, exculpatory statements,
24 which tends to show his innocence, his non-involvement
25 in the crime charged, if that is later shown to be

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3 false, then the jury may infer from those exculpatory
4 statements later shown to be false, and all the
5 other evidence in the case, the jury may infer
6 that there was a consciousness of guilt that he was
7 aware that he was guilty of the crime charged.

8 Now, the reason that you may draw the in-
9 ference is because the law recognizes that it is
10 reasonable to infer that an innocent person does
11 not usually find it necessary to invent or fabricate
12 an explanation or statement tending to establish his
13 innocence.

14 Now, whether or not evidence as to a de-
15 fendant's voluntary statements or statement points
16 to consciousness of guilt -- and the significance
17 to be attached to any such evidence on that is ex-
18 clusively within the province of the jury.

19 Now, the statement must be knowingly and vol-
20 untarily made, not just an accidental statement. The
21 defendant must be shown by proof beyond a reasonable
22 doubt that he was aware of what he was saying; must
23 be shown that it was voluntarily made; that he in-
24 tended to make that statement; and the Government must
25 prove beyond a reasonable doubt that before he made
that statement he was advised of his constitutional

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2 rights and he was advised of the consequences if he
3 made the statement. In other words, that he had the
4 right to remain silent; that he didn't have to say
5 anything if he didn't want to, but if he did, it
6 could be used against him; he had a right to counsel;
7 and if he couldn't afford counsel, the Court would
8 appoint counsel. If the Government hasn't proved all
9 that beyond a reasonable doubt, then disregard the
10 exculpatory statements.

11 The indictment, which I will read to you, is
12 based on Federal statutory law. The book I am
13 holding is Crime and Criminal Procedure and it con-
14 tains statutes passed by the Congress. It is the
15 Congress that defines what a crime is.

16 The indictment is based on certain sections of
17 Title 18. And the reference to it is a reference to
18 the codification of the statutes under Crimes and
19 Criminal Procedure.

20 I am going to read the indictment first and then
21 the statute. I am going to read Count 2 first because
22 Count 2 is the graver charge, the more serious charge.
23 It has one element in it that Count 1 does not have.

24 Count 2 charges as follows:

25 On or about the 9th day of May, 1974, within

Charge of the Court

587

1 the Eastern District of New York, the defendants
2 Thomas B. Murphy and Robert Widman, knowingly and
3 willfully, by force, violence and intimidation, did
4 take from the person and presence of employees of
5 the Chase Manhattan Bank, 190-02 Jamaica Avenue,
6 Jamaica, New York, approximately \$73,594, United States
7 currency, which money was in the care, custody, control
8 management and possession of the said bank, the deposit
9 of which bank were then and there insured by the
10 Federal Deposit Insurance Corporation, and in com-
11 mission of this act and offense the defendants
12 Thomas B. Murphy and Robert Widman --

13
14 Now, this is the additional element that you
15 won't find in Count 1.

16 -- and in commission of this act and offense
17 the defendants Thomas B. Murphy and Robert Widman did
18 assault and place in jeopardy the lives of the said
19 bank employees as well as the lives of other persons
20 present by the use of a dangerous weapon.

21 That's in violation of Title 18, United States
22 Code, Section 2113(d).

23 Now, remember the Subsection (d).

24 Now, I will read Count 1 to you. And you will
25 find that it agrees exactly the same, except it leaves

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2 out the last element, when I stopped and hesitated
3 and said, and in the commission of this act -- that's
4 not in the first Count.

5 It reads as follows:

6 On or about the 9th day of May, 1974, within
7 the Eastern District of New York, the defendants
8 Thomas B. Murphy and Robert Widman, knowingly and
9 willfully, by force, violence, and intimidation, did
10 take from the person and presence of employees of the
11 Chase Manhattan Bank, 190-02 Jamaica Avenue, Jamaica,
12 New York, approximately \$73,594, in United States
13 currency, which money was in the care, custody,
14 control, management and possession of said bank, the
15 deposits of which bank were then and there insured by
16 the Federal Deposit Insurance Corporation, in vio-
17 lation of Title 18, United States Code, Section 2113(a).

18 Now, 2113(a) of Title 18 says, whoever, by
19 force and violence, or by intimidation, takes from
20 the person or presence of another, any property or
21 money belonging to, or in the care, custody, control,
22 management or possession, of any bank, commits a
23 violation of that section.

24 So you notice the phraseology is very much
25 like the phraseology in the indictment.

That's Section (a) of 2113.

Now, (d) says, whoever, in committing any offense defined in Subsection (a) assaults any person or puts in jeopardy the life of any person by the use of a dangerous weapon or device, commits a violation of Subsection (d).

So that's what makes it the more serious crime, the graver crime.

Now, I indicated to you that bank robbery is not a Federal crime unless the money that is in the care, custody, control and management of the bank, the bank's money is insured by a Federal agency or corporation. In this case, the Federal Deposit Insurance Corporation. That is also in the Section, Subsection (f).

It says, as used in this section, the term bank means -- I will skip a lot of the other material -- any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.

In considering whether the Government has prove the indictment of a defendant by proof beyond a reasonable doubt, I am going to ask you to first consider Count 2, the graver crime. The Government must prove all the following elements by proof beyond

1
2 a reasonable doubt.

3 One. That on May 9, 1974, the accused took
4 approximately \$73,594 from the person or presence of
5 the tellers or other employees of the Chase Manhattan
6 Bank, 190-02 Jamaica Avenue, Jamaica, New York,
7 which money belonged to, or was in the care, the
8 custody, control and management of the Chase Manhattan
9 Bank.

10 That's one element.

11 Two. The act of taking such money by force
12 and violence, or by means of intimidation.

13 Three. Doing such act knowingly and willfully.

14 Four, that the Chase Manhattan was a banking
15 institution, the deposits of which were insured by
16 the Federal Deposit Insurance Corporation at the
17 time of the offense alleged.

18 And five, the act or acts of assaulting or
19 putting in jeopardy the life of any person by the
20 use of a dangerous weapon or device while engaged in
21 stealing such money from the bank as charged.

22 Now, the Government must prove all those
23 essential elements beyond a reasonable doubt. If
24 you find the accused guilty of Count 2, don't con-
25 sider Count 1. Because if you've found the accused

1
2 guilty of Count 2, you have already found him guilty
3 of Count 1. But if you haven't found the accused
4 guilty of Count 2, if you find the accused not guilty
5 of Count 2, then you go to Count 1. And the Govern-
6 ment there must prove all the essential elements
7 of the Count charged except for the last one. And
8 that essential element is the act or acts of assaulting
9 or putting in jeopardy the life of any person by the
10 use of a dangerous weapon or device while engaged in
11 stealing such money from the bank.

12 Now, as I say, an act is done knowingly when
13 the person doing it is aware of what he is doing.
14 It is a voluntary and intentional act, not one by
15 mistake or accident. And the statute and the charge
16 in the indictment say the act must be done willfully.
17 And an act is done willfully if done voluntarily and
18 with specific intent to violate the law, the specific
19 intent to do that which the law forbids.

20 Now, the Government must prove that the money
21 was taken by either force and violence, which means
22 physical force. And violence, I don't think I have
23 to explain any further. Or through means of intimi-
24 dation. When we talk about taking by intimidation, it
25 means the willful taking of the money by putting the

employee in fear of bodily harm.

Now, the fear we are talking about is not just fear that someone might have because of some temperamental timidity, but the fear that is generated from what the perpetrators said and did, and a fear that he knowingly intends to convey to the employees of the bank.

Count 2, when we talk about the element of either assaulting a person, the Government must prove beyond a reasonable doubt that the accused while committing the bank robbery assaulted or put in jeopardy the life of an employee of the bank at the time.

Now, an assault is a willful attempt to, a threat to inflict physical harm coupled with an apparent present ability to do so, or any intentional display of force as would give the victim reason to fear and expect immediately bodily harm. When we talk about putting a life in jeopardy by the use of a dangerous weapon or device, we mean that the Government must prove beyond a reasonable doubt that the employee or employees were exposed to death, and that the device or weapon used was capable of inflicting death -- capable of killing an employee of the bank.

1
2 I have charged you on all the essential
3 elements of the crime charged. And, of course, the
4 Government must prove that the accused was the
5 perpetrator; in effect, prove that the accused was
6 in the bank, robbing the bank on May 9, 1974, at
7 or about 8:30 or whatever you find the time to be.

8 The lawyers indicated that that was a critical
9 issue in this case.

10 Now, I want to make sure that the issue is
11 properly phrased. The Government must prove beyond
12 a reasonable doubt that the accused who you find to
13 be guilty of the crime was present at the bank.
14 And the Government must prove that beyond a reasonable
15 doubt. The Government doesn't necessarily have to
16 prove beyond a reasonable doubt that any particular
17 witness identified the accused or either of them as
18 the person present in the bank. Identification
19 testimony is some of the proof that the Government
20 offered --the main proof that the Government offered
21 -- and I am talking about identification testimony
22 given by all of the bank witnesses -- but there is
23 other proof in the case. When I say there is other
24 proof in the case, I am not indicating that you
25 should credit or believe it. I just want to point

1
2 it out to you.

3 Turning to identification testimony:

4 The evidence in the case includes testimony
5 by Alice DeChiara, Lottie Hoggard, and Joseph Leader,
6 on a prior photographic identification from a spread
7 or spreads of photographs. There has been in-court
8 identification of Mr. Widman by -- and I shouldn't
9 say identification. I should say there is some
10 testimony given by Christina Jonke, Marie Daly,
11 Barbara Ransom and Plenio Medina in Court where the
12 witnesses pointed out with varying degrees of
13 certainty that the defendant Robert Widman was the
14 taller of the bank robbers.

15 There has also been prior photographic
16 identification by Mrs. Jonke and Mrs. Daly of the
17 defendant Robert Widman as the taller bank robber.

18 There has been testimony -- and I can't re-
19 call the witness that identified the defendant
20 Robert Widman in the lineup. There is also testimony
21 of the witnesses -- and I don't recall who -- of
22 the failure to identify the defendant Murphy in the
23 lineup. And I think there is some testimony of one
24 or more witnesses that failed to identify the
25 defendant Widman in the lineup.

1
2 Identification testimony must be received
3 with caution and scrutinized with great care.

4 Identification testimony is an expression or belief
5 by the witness of what the witness saw at the time
6 of the crime. The question that should be uppermost
7 in your mind is whether when the witness selected a
8 picture from a spread, selected an individual from a
9 lineup, or made an in-court identification, whether
10 that was the impression that remained in her mind or
11 his mind from what he or she saw at the time --

12 -- as far as the bank employees are concerned,
13 at the time of the robbery, as far as Mr. Medina is
14 concerned, at the time he walked along the street and
15 said he saw an individual in the blue 1965 Cadillac.
16 And that such testimony is not given from any suggestion
17 either through the manner the spread was offered or
18 the lineup was made.

19 In appraising the identification testimony
20 of the witness, you should consider the following:

21 One, whether the witness had the capacity and
22 the adequate opportunity to observe the perpetrator
23 or perpetrators.

24 This will depend on all the circumstances
25 at the time the witness observed the perpetrator or

1
2 offenders.

3 Take into consideration how long or how
4 short a time the witness saw the offender, or how
5 far or how close the witness was to the offender,
6 the lighting conditions at the time, the position
7 from which the witnesses viewed the offender, the
8 emotional state of the witness at the time. Would
9 someone be inclined to be confused, or would it
10 sharpen the witness's view and recollection of the
11 offender.

12 Take into consideration the strength of the
13 identification. Was the witness absolutely sure or
14 absolutely certain, reasonably certain, or in such
15 a serious doubt as to the resemblance to the
16 offender that the identification would be worthless.

17 Scrutinize all the circumstances under which
18 the identification was made prior to trial.

19 If the identification was through the spread
20 of photographs, take into consideration when the
21 identification was made, how soon after the crime.
22 Take into consideration whether the witness selected
23 a photograph from a spread.

24 In this case, the testimony is that it was a
25 spread of 6. Well, look at the photographs. Was it

1
2 a fair sampling? Is it the kind of selection
3 someone would make from all these photographs if
4 the impression came at the time of the robbery?
5 Were the photographs similar enough so that someone
6 who hadn't seen the perpetrator, or no impression was
7 made, would have picked the defendant as the per-
8 petrator?

9
10 (Continued next page.)
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1
2 Was it the type of spread that in all likli-
3 hood only someone who would have seen the perpetrator
4 would have picked the defendant as the perpetrator?
5 The lineup identification procedure, you determine
6 whether it was fair. Were the men selected similar
7 enough so that someone who had seen the perpetrator
8 at the time of the crime would have picked the
9 perpetrator out?

10 Was it the kind that was unfair so that any-
11 one without even having seen the perpetrator, would
12 have picked that individual out?

13 Take into consideration the fact that if more
14 than one witness may have selected a defendant as
15 a perpetrator, does not necessarily mean that if two
16 picked the defendant out as the perpetrator of the
17 crime that two is necessarily any greater than one.
18 Use your good common sense in determining for yourself,
19 based on how the witnesses testified, as to whether
20 collectively all of the testimony brings you to the
21 conclusion that the Government proved that the
22 accused was present at the bank. Take into considera-
23 tion the failure of the witnesses to make a selection.

24 The Government's burden is to prove that the
25 accused was present in the bank and committed the

1 robbery. In addition to identification testimony,
2 you may consider all the other evidence in the case,
3 all the testimony concerning a 1965 Cadillac in the
4 area of the bank for three days, prior to the robbery.
5 In itself is not to say being at the bank is any
6 proof. I say you do not segregate testimony and say,
7 "Does this bit of testimony prove beyond a reasonable
8 doubt that the defendants perpetrated the crime?"
9 You must examine the entire evidence in the case to
10 make the determination. If you believe the statements
11 by the defendant Widman was knowingly and voluntarily
12 made under the charge I gave you, of course, you
13 consider that testimony as part of the evidence in
14 the case and based upon all the evidence in the case
15 you determine whether the Government has proved the
16 guilt of the defendant by proof beyond a reasonable
17 doubt.
18

19 Now, the other count in the indictment, Count 3
20 reads as follows:

21 "On or about and between the 6th day of May
22 1974 and the 9th day of May 1974, both dates being
23 approximate and inclusive, within the Eastern District
24 of New York, the defendants Thomas B. Murphy and
25 Robert Widman did knowingly and wilfully conspire

1
2 to commit an offense against the United States,
3 in violation of Title 18, United States Code, Section
4 2113 (a) and Section 2113 (d) by conspiring to take
5 by force and violence a sum of money which was in the
6 care, custody, control, management and possession
7 of the Chase Manhattan Bank, 190-02 Jamaica Avenue,
8 Jamaica, New York, the deposits of which bank were then
9 and there insured by the Federal Deposit Insurance
10 Corporation.

11 "In furtherance of the said unlawful conspiracy
12 and for the purpose of effecting the objectives thereof,
13 the defendants Thomas B. Murphy and Robert Widman,
14 within the Eastern District of New York committed the
15 following overt acts:

16 "1. On or about May 6th, 7th, and 8th, 1974, the
17 defendants Thomas B. Murphy and Robert Widman positioned
18 themselves within the vicinity of said bank at a place
19 where the daily functions of the bank could be
20 observed.

21 "2. On or about the 9th day of May 1974, the
22 defendants Thomas B. Murphy and Robert Widman entered
23 the Chase Manhattan Bank at 190-02 Jamaica Avenue,
24 Jamaica, New York and had in their possession
25 dangerous weapons."

1 This is called the conspiracy count and comes under
2 a different section of Title 18. Section 371 defines
3 the crime of conspiracy as follows:
4

5 "If two or more persons conspire either to
6 commit any offense against the United States or to
7 defraud the United States or any agencies thereof
8 in any manner or for any purpose, and one or more of
9 such persons does any act to effect the object of
10 the conspiracy, the section is violated."

11 You see, on the one hand the statute is specific.
12 It refers to bank robbery. That is what we call a
13 substantive crime. On the other hand the conspiracy
14 statute is a general statute. It does not talk about
15 completing a crime. What it prohibits and what it
16 defines as a crime is the understanding and the
17 agreement to commit a crime by two or more persons
18 and the committing of an overt act in furtherance
19 of the purposes of that conspiracy. A conspiracy
20 is a combination of two or more persons by concerted
21 action to accomplish an unlawful purpose. A conspiracy
22 is a kind of partnership in criminal purposes. It is
23 an understanding or agreement to get together in this
24 case to rob the Chase Manhattan Bank at 190-02 Jamaica
25 Avenue. The Government charges -- and again I do not

1
2 mean to say that I find that the Government has
3 established its claim, nor do I indicate in any way
4 that the testimony is to be believed because that is
5 a question solely for you. The Government's position
6 is that the planning of this bank robbery started on
7 or about May 6th. That is the preparation for it,
8 the casing of the bank, and that the robbery itself
9 was an overt act. It is not really the robbery, it is
10 that they positioned themselves on May 6th, 7th and
11 8th, 1974 in the vicinity of the bank and the claim
12 is that they did that for the purpose of carrying
13 out their deal, their understanding to commit bank
14 robbery and the other overt act claimed is that they
15 entered the bank in possession of dangerous weapons.

16 Even though the Government claims they completed
17 the purpose of the agreement, the conspiracy, the
18 Government does not have to prove that the bank robbery
19 actually was completed in order to prove conspiracy
20 because again I say it is the unlawful agreement that
21 is the crime and not the bank robbery. That is why
22 we call it the "conspiracy charge."

23 In order for the Government to prove the charge
24 in Count 3, the Government must prove beyond a reason-
25 able doubt that the conspiracy described in the

1
2 indictment was wilfully formed and was existing at
3 or about the time alleged, that it was existing for
4 the purpose alleged, to wit, to rob the bank.

5 Second, that the accused wilfully became a
6 member of the conspiracy. In every crime you have to
7 have criminal intent and that is what wilfully means.
8 The Government must prove beyond a reasonable doubt
9 that they entered into this deal or understanding
10 among themselves or between themselves -- between
11 Murphy and Widman -- voluntarily, intentionally and
12 for the purpose of robbing the bank.

13 Three, that one of the conspirators thereafter
14 knowingly committed one of the overt acts charged
15 in the indictment on or about the time alleged.

16 I just went over the two overt acts alleged.
17 The Government must prove that one of those overt
18 acts were committed, and;

19 Four, that such overt act was knowingly done
20 in furtherance of some object or purpose of the
21 conspiracy.

22 In this case it means that the Government
23 prove that whoever committed the overt act -- here
24 the Government claims that both did -- committed the
25 overt act aware of what he was doing and knowing it

1
2 was done in order to accomplish the purpose, to wit,
3 to rob the bank.

4 Now, I will shortly excuse you from the court-
5 room to deliberate on the matter, but I want to remind
6 you that your verdict must be unanimous. Each juror
7 must decide the case for himself or herself.

8 Again, you have the obligation of exchanging
9 your views concerning the evidence with the other
10 members of the jury. You **violate your obligation** if
11 you abandon your duty and just go along without
12 talking about the evidence, without making up your
13 own mind by leaving it to the other jurors.

14 Similarly you violate your obligation if you
15 obstinately refuse to discuss your views with the
16 other jurors and if you take the position that you
17 have arrived at a verdict and you won't budge and
18 you refuse to discuss the evidence. There is nothing
19 wrong with changing your opinion after you have
20 arrived at a tentative opinion if you do so fairly
21 and honestly and if you can do so based on what you
22 understand the evidence to be. You may give up a
23 judgment or determination tentatively arrived at if
24 you can do **so without doing violence to your judgment.**

25 If you have any communication with the Court,

1 all communications will come through your foreman.
2
3 If you want to hear any testimony try to identify it,
4 try to tell us what testimony you would like. Give
5 the name of the witness if you can, the subject matter
6 if you can. When we have found the testimony you want,
7 I will call you into the courtroom and I will read it
8 to you. Everything that we do must be done in open
9 court and be recorded.

10 During the deliberations, do not tell me how
11 you stand at any time during your deliberations. I
12 am not interested in knowing whether it is six to six,
13 eight to four, ten to two or eleven to one. I am
14 interested in knowing when you have arrived at a
15 unanimous verdict and all you need say to me: "We
16 have arrived at a verdict."

17 Do not tell me what the verdict is. AT that
18 time I will call you into the courtroom and I will ask
19 the Foreman to stand and in effect I will say:

20 "Madam Foreman, how do you find the defendant,
21 Thomas B. Murphy, as to Count 2?"

22 Again, I will remind you I will ask you about
23 Count 2 first. If you say "Not guilty" I will say
24 then:

25 "How do you find as to Count 1?"

1
2 Then you will render the verdict. If you say
3 "Not Guilty" I will not ask you further about Count 1.
4 Then I will go to Count 3 and I will ask you:

5 "How do you find the defendant, Thomas B.
6 Murphy, as to Count 3?"

7 You will render your verdict guilty or not
8 guilty. I will ask you the same about Robert Widman
9 and then I will ask Juror No. 2 whether she heard the
10 verdict as rendered by the Foreman and if she says
11 "Yes" I will say:

12 "Is that your verdict?" And, I will go to
13 Juror No. 3 and ask whether that is your verdict and
14 so on until I call on Juror No. 12 to render her
15 verdict. If all the jurors agree in open court to
16 the verdict, then for the first time it becomes the
17 verdict of this case.

18 Now, I ask you to retire from the courtroom.
19 Do not start your deliberations yet. I want to talk
20 to the lawyers for a few moments and then I will
21 call you back into the courtroom.

22 (Jury leaves courtroom.)

CERTIFICATE OF SERVICE

May 19, 1975

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York and to counsel for the co-appellant.

Reynold H. Burt